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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 311

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner herein prays that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit entered May

18, 1959, printed in the appendix, infra, pp. 8-23, affirming a judgment of the United States District Court for the District of Montana entered on December 9, 1958, reported at 168 F. Supp. 911 and printed in the appendix, infra, pp. 24-44, dismissing petitioner's complaint seeking to enjoin a threatened strike of petitioner's railroad operations in Montana by respondents.

STATEMENT OF JURISDICTION.

The Judgment of the Court of Appeals was entered on May 18, 1959. This Court has jurisdiction to review that Judgment under the provisions of 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED.

The question presented in this matter is whether the dispute between petitioner and its employees whether the switching work in the Berkeley Yard will be done by petitioner's employees or The Anaconda Company's employees is a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C.A., sections 101-115, and if so, whether it is a "major dispute" or a "minor dispute" within the meaning of the Railway Labor Act, 45 U.S.C.A., sections 151 et seq.

Subordinate questions presented by this action are whether the separate corporate entities of The Anaconda Company and the petitioner should be ignored and the two treated as one employer, thus making

Anaconda a "carrier" as the term is used in the Railway Labor Act for purposes of this dispute, and if so, whether the carrier has violated the so-called "status-quo" provisions of the Railway Labor Act, 45 U.S.C.A., section 156. Also presented is the question whether the action of the petitioner in withdrawing the Section 6 notices it had previously sent respondents served to terminate the dispute over amendment of its collective-bargaining agreements with its employees. A further question presented is whether, in the absence of a contractual right to claim work at a certain location, the demand of petitioner's employees that its parent corporation, The Anaconda Company, grant them certain specified jobs or work at a designated point, such as the Berkeley Yard, is a mandatory subject of bargaining for either The Anaconda Company or petitioner. In other words, is the demand of respondents that The Anaconda Company permit them to do the switching work in the Berkeley Yard in place of its own employees a demand affecting "rates of pay, rules or working conditions" as those words are used in the Railway Labor Act, 45 U.S.C.A., section 156.

STATUTES INVOLVED.

The statutes involved are parts of the Norris-LaGuardia Act, 29 U.S.C.A., sections 101, 107 and 113 and of the Railway Labor Act, 45 U.S.C.A., sections 155 First (a) and (b) and 156. These statutes are printed in the appendix, infra, at pp. 1-7.

STATEMENT OF CASE.

This action arose on the complaint of petitioner, a common carrier by rail operating in Montana, seeking to enjoin its employees, members of respondent Brotherhoods, and respondents from calling a strike against its railroad operations. A dispute had developed between petitioner and its employees concerning switching work in an industrial yard of The Anaconda Company in Butte, Montana, which could not be satisfactorily resolved, and consequently petitioner was faced with a strike threat. The background of the dispute is: The Anaconda Company owns and operates an open-pit copper mine at Butte, Montana, known as the Berkeley Pit. This open-pit operation has been functioning since 1956. Ore is mined by means of large electric power shovels digging ore exposed by stripping operations and loading it into large trucks. These trucks then haul the ore to an unloading point where it is dumped into a crusher and conveyed on belts either to ore bins or loaded directly on railroad ore cars for carriage to The Anaconda Company's ore production works at Anaconda, Montana. When production commenced in the Berkeley Pit, the ore removed was loaded on railroad cars at a point on plant line of railroad east of the Berkeley Pit and near the Leonard Mine in Meaderville. All switching operations at this point were conducted by employees of the Butte, Anaconda & Pacific Railway Company, represented by the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen. As ore production at the pit increased, it became apparent that this loading facility was inade-

quate, and a decision was made by The Anaconda Company to construct an industrial yard facility at a point south of the Berkeley Pit and approximately one-half mile from the former loading point. This required a crusher, conveyor system, stock pile and ore bins and, in addition, tracks were to be installed so that railroad cars could be brought to this point for loading. This new facility was designated "The Berkeley Yard." Since there were no tracks at this point, it became necessary to lay tracks where cars could be stored or spotted for loading and to install trackage which would connect with main line tracks. Because of the location of the new yard and to accommodate the public by restricting street crossings to a minimum, the new trackage was designed to connect with the Northern Pacific right of way rather than the Butte, Anaconda & Pacific Railway main line. The Butte, Anaconda & Pacific Railway Company and the Northern Pacific Railway Company entered into a joint trackage agreement whereby Butte, Anaconda & Pacific Railway ore trains would travel over Northern Pacific Railway tracks from a point near the Berkeley Yard to Durant, a distance of fourteen (14) miles, before entering the main line of the Butte, Anaconda & Pacific Railway. Butte, Anaconda & Pacific Railway trains had previously traveled over Northern Pacific Railway trackage in hauling Berkeley ore, but only for a distance of approximately one-half mile. The Butte, Anaconda & Pacific Railway Company is a common carrier subject to regulation by the Interstate Commerce Commission and the Montana Railroad and Public Service Com-

mission. It is a wholly-owned subsidiary of The Anaconda Company and subject to its control through stock ownership. The two companies are, and always have been, operated as separate corporations. The Berkeley Yard is owned by The Anaconda Company and switching operations therein since it was placed in service in March, 1958, have been conducted by its employees, represented by the Butte Miners' Union No. 1. It is this fact which has resulted in the action under review. The chronology of events up to the present is as follows:

In September of 1957, the Butte, Anaconda & Pacific Railway Company served a formal Section 6 notice under the Railway Labor Act (45 U.S.C., Sec. 156) on the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen to reopen the existing working agreement to permit main-line crews to conduct loading and switching operations in the new Berkeley Yard. Pursuant to this notice, a formal conference was held on the carrier's property at Anaconda, Montana, on October 10, 1957. This proposal was rejected and the organizations accepted a verbal Section 6 notice to consider reopening the working agreements to permit use of a three-man yard crew in the Berkeley Yard rather than the required five-man crew. This proposal was also rejected.

On October 25, 1957, the services of the National Mediation Board were invoked by the organizations. Thereafter another conference was held on November 13, 1957, between representatives of the carrier and

the organizations to discuss the same subject matter, which was also unsuccessful.

On January 16, 1958, a meeting, attended by representatives of the carrier, the organizations and Mr. Frank K. Switzer, a representative of the National Mediation Board, was arranged in an effort to resolve the work dispute.

After this meeting, which resulted in no agreement, the carrier notified the National Mediation Board and the organizations that it was withdrawing the Section 6 notices previously given. Thus, the working agreements were to remain in effect as they were and without change.

The organizations on February 20, 1958, requested the National Mediation Board to retain jurisdiction despite the withdrawal by the carrier of its request to reopen the contracts.

On March 8, 1958, the organizations submitted proposed agreements covering operations from the new yard over the Northern Pacific Railway trackage to last until they were given the switching work in the Berkeley Yard.

On or about March 5, 1958, Mr. Switzer returned to Anaconda for meetings with the organizations and the carrier. No progress was reached and the organizations advised the carrier that they would strike its operations on March 14, 1958. On March 13, 1958, a temporary injunction was obtained in the District Court of the Second Judicial District of the State of Montana. The cause was later transferred to the

United States District Court for the District of Montana since the matter in controversy was in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs and the action arose under the laws of the United States.

After trial of the case on July 16 and 17, 1958, the District Court, on November 4, 1958, filed its Memorandum and also filed its Findings of Fact and Conclusions of Law that the temporary restraining order previously issued be dissolved. On December 8, 1958, the Court signed its Judgment in favor of Appellees in accordance with its Findings of Fact and Conclusions of Law. Thereafter, on January 2, 1959, Appellant filed its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of the District Court, and on May 18, 1959, that Court filed its Judgment affirming the Judgment of the District Court.

REASONS FOR ALLOWANCE OF WRIT.

As a result of the judgments of the District Court and of the Court of Appeals below holding that a parent mining corporation must negotiate under the Railway Labor Act with employees of its subsidiary railroad corporation, the issue whether certain work will be done by such railroad employees rather than by the parent's own employees there has been created a jurisdictional "no man's" land, in which neither the Railway Labor Act, under which petitioner operates, nor the Labor Management Relations Act

of 1947, as amended, 29 U.S.C.A., sections 141 et seq., under which The Anaconda Company has operated in the labor relations field, can function to assist in an orderly resolution of the dispute now existing. The respondents herein may and will resort to self-help in the form of a strike which will not only force suspension of the petitioner's operations but also of The Anaconda Company's Montana operations as well.

On the other hand, the International Union of Mine, Mill and Smelter Workers, representing The Anaconda Company's employees, have obtained a temporary restraining order restraining The Anaconda Company from transferring the disputed work from its own employees to the respondents herein or anyone else. Thus, a situation will develop wherein The Anaconda Company must face a crippling strike which it must suffer or else be in contempt of court.

The circumstances of this case are such that interpretations of the Railway Labor Act are involved, which, because of the impact of this case on short line railroads in the United States, should be settled by this Court.

The courts below have held that the original proposed contract change in consequence of which petitioner served Section 6 notices on respondents; namely, to amend the existing agreements to provide that at a certain location (the Berkeley Yard) switching would be done with three man crews rather than five-man crews is the same dispute as that which now exists and that is whether petitioner and its employees will conduct switching operations at the Berkeley Yard

or whether such work will be done by The Anaconda Company through its employees.

Petitioner most vigorously contends that there is a great distinction between a dispute over how many employees are required to do a certain job and over whether the job will be done at all. In the first instance, it is conceded that any dispute would be a "major" dispute; however, in the second instance, we believe that this is no dispute since the decision lies within the prerogatives of management. *Chicago and North Western Railway Company v. Order of Railroad Telegraphers,* (U.S.C.A., 7th Circuit) 264 F. (2d) 254, and, if such a decision is one management may make, no labor dispute can arise since the issue is not a subject of mandatory bargaining nor does it matter that such dispute arose out of a proposed contract change. *National Labor Relations Board v. Borg-Warner Corp.,* 356 U.S. 342, 78 S.Ct. 718; *Chicago and North Western Railway Company v. Order of Railroad Telegraphers,* supra.

In addition to the Seventh Circuit in the *Chicago and North Western* case, the Fifth Circuit has also ruled on the question whether a dispute of similar nature is one affecting "rates of pay, rules, or working conditions," as those words are used in the Railway Labor Act. See *Missouri-Kansas-Texas Railroad Company v. Brotherhood of Locomotive Engineers* (U.S.C.A., 5th Circuit) 266 F. (2d) 335.

It is submitted that the decision of the Court of Appeals for the Ninth Circuit in this case, holding that the demand of a carrier's employees that the

carrier continue jobs previously established is a bargainable matter under the Railway Labor Act, is in conflict with that of the Court of Appeals for the Seventh Circuit in the *Chicago and North Western* case, supra.

It is further respectfully urged that the impact of a decision that a parent industrial or mining corporation wholly owning a subsidiary railroad corporation is by virtue of such ownership to be considered a "carrier" under the Railway Labor Act is of such vital importance that it should be settled only by this Court.

The dispute here arose over the taking away from the carrier by its parent of certain switching work which it had in the past performed at another location. The reason for the change was based solely on a need for economy of operation if Anaconda is to remain competitive in its business. All industry, railroads included, recognizes the need to operate more economically and efficiently in wake of the constantly increasing cost of doing business. We may expect, then, that the same dispute will erupt many times when other carriers, or their parent corporations, attempt to effect similar economies of operation either through technological techniques or elimination of useless jobs. It is of great importance not only to the issues of this case but in the administration of the Railway Labor Act as well that this Court determine whether management has the prerogative to make decisions of the nature involved here affecting its operations, so long as no collective-bargaining agreements

are breached, without being required to negotiate such proposed determinations with its employees and face a strike in order to effect such changes.

CONCLUSION.

The Court for the foregoing reasons is most earnestly requested to grant the prayed for writ of certiorari herein.

Dated, Butte, Montana,
August 6, 1959.

Respectfully submitted,

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Of Counsel.

(Appendix Follows.)

Appendix

STATUTES

29 U.S.C.A. § 101

§ 101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C.A. § 107

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been com-

mitted and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be

unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

29 U.S.C.A. § 113

§ 113. Definition of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

45 U.S.C.A. § 155 First (a) and (b)

§ 155. Functions of Mediation Board—Disputed within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

45 U.S.C.A. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt

of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

United States Court of Appeals
for the Ninth Circuit

No. 16,372

May 18, 1959

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Appellant;

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Appellees.

Appeal from the United States District Court for the District of Montana

Before: Barnes, Hamley, and Jertberg, Circuit Judges

HAMLEY, Circuit Judge:

This action was brought by Butte, Anaconda & Pacific Railway Company to enjoin defendant Brotherhoods from calling a strike. The district court after

hearing entered a judgment dismissing the action. The court's findings of fact, conclusions of law, and supporting opinion are reported in 168 F.Supp. 911. Plaintiff appeals.[1]

The principal questions presented here involve aspects of the Railway Labor Act, 45 U.S.C.A., sec. 151 et seq. They are: (1) Whether the controversy was a major or minor dispute under that act; (2) whether the dispute and resultant mediation proceedings had been terminated; and (3) whether during the pendency of the mediation proceedings appellant failed to preserve the status quo, as required by section 6 of the act, 45 U.S.C.A., sec. 156.

Appellant operates a railroad in Montana, hauling freight as a common carrier engaged in interstate commerce. It is a wholly-owned subsidiary of Anaconda, and both corporations are managed by the same staff of officers from president down to secretary-treasurer. All major policy decisions are made for appellant by officers who are also officers of Anaconda. In making such decisions the controlling consideration is the ultimate effect which the decisions will have on the profits earned by Anaconda.

Anaconda owns and, since 1956, has operated an open pit copper mine at Butte, Montana, known as the Berkeley Pit. Prior to March 14, 1958, the ore from this pit was loaded in appellant's ore cars at a loading

[1] Attorneys for The Anaconda Company (Anaconda), International Union of Mine, Mill & Smelter Workers (International Union), and Locals Nos. 1, 16, and 17 of that union, were permitted to appear before this court as amici curiae.

yard known as the old Berkeley Yard. The work of switching ore cars in the old Berkeley Yard and between that yard and the West Butte Yard was performed by yard crews of appellant. The men in these crews were members of appellee Brotherhoods, and performed such work pursuant to agreements between the railroad and the Brotherhoods. Under these agreements each yard crew which performed switching service consisted of five men.

Prior to March 14, 1958, a new loading and switching yard, commonly referred to as the new Berkeley Yard, was constructed for Anaconda to serve the Berkeley Pit. Anaconda ascertained that its employees, represented by International Union, were willing to do the switching at the new Berkeley Yard on a three-man crew basis. It therefore decided to do its own switching when the new Berkeley Yard was put in operation. However, the then manager of appellant obtained permission from Anaconda to explore the possibility of having the switching done by the railroad's employees on as economical a basis as it could be done by Anaconda. If this were found to be possible, then Anaconda would continue to contract this switching to appellant as it was then doing at the old Berkeley Yard.

With this purpose in mind, appellant on September 27, 1957, served upon appellee Brotherhoods a so-called section 6 notice under the Railway Labor Act.[2] In this

[2]Section 6 of the act, 45 U.S.C.A., sec. 156, reads as follows:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in

notice appellant proposed an amendment of the existing agreements between it and the Brotherhoods to permit the loading of ore in the new Berkeley Yard with main line crews instead of yard crews. Appellee Brotherhoods rejected this proposal. Appellant then served another section 6 notice in which it was proposed that the existing agreements be amended to provide that the yard crews in the new Berkeley Yard consist of three men rather than five men.

Appellee Brotherhoods declined to agree to such an amendment. On October 25, 1957, they invoked the mediation services of the National Mediation Board. The Board docketed this dispute as Mediation Case No. A-5623. A mediator was assigned to the case by the Board and a conference of the parties under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods there indicated their continued unwillingness to accept either of the contract amendments proposed by appellant. The railroad then informed the Brotherhoods that when the new Berkley

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agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Yard was put into operation the switching would be done by employees of Anaconda.

On January 17, 1958, appellant notified the mediator and the Brotherhoods tht it was withdrawing the section 6 notices, with the intention thereby of terminating the mediation proceedings. The Brotherhoods, however, took the position that in view of appellant's announcement that Anaconda would do the switching at the new Berkeley Yard a dispute necessitating mediation continued. The Board decided to resume active mediation and advised the parties that conferences would begin on March 5, 1958. No progress was made at these conferences.

On March 7, 1958, appellant advised the Brotherhoods that the loading of ore cars in the new Berkeley Yard would commence shortly. The Brotherhoods were further advised that appellant did not consider the "status quo" provision of the Railway Labor Act as applicable to the contemplated discontinuance of switching service by appellant.[3]

Under the plan for service in and to the new Berkeley Yard developed by appellant and Anaconda, appellant's trains would use Northern Pacific Railroad Company tracks between Durant, Montana, and the new yard. Seeking to take advantage of this fact as a basis for bargaining, the Brotherhoods on March 8, 1958, submitted to appellant a proposed agreement. Under this proposal appellant would be required to pay substantial additional compensation to its railroad

[3]The so-called "status quo" provision is contained in the second sentence of section 6, quoted in footnote 2.

employees because of its use of Northern Pacific tracks. It was proposed that the agreement would become effective when Anaconda employees took over the switching at the new Berkeley Yard. It would continue until such switching was returned to appellant's employees represented by the Brotherhoods.[4] Neither the Brotherhoods nor appellant gave a section 6 notice in connection with this proposed agreement.

Appellant apparently rejected the proposed agreement. On March 11, 1958, the Brotherhoods notified appellant that the latter's employees represented by the Brotherhoods would strike on March 14, 1958.[5] On March 13, 1958, appellant sent a telegram to the National Railroad Adjustment Board calling attention to the Brotherhoods' proposal of March 8, 1958. Asserting that the latter were seeking "to impose severe penalties upon carrier," appellant asked the Adjustment Board to "accept jurisdiction and docket." On the following day the Adjustment Board advised appellant by telegram that jurisdiction could not be accepted on the basis of appellant's telegram. It would be necessary, appellant was advised, to submit the matter "in accordance with circulars one B and C." The record does not indicate that appellant thereafter perfected

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[4] It is recited in this proposed agreement that the agreement does not dispose of, set aside, or prejudice the position of the Brotherhoods that appellant was not entitled to turn over the switching work at the new Berkeley Yard to Anaconda.

[5] The reasons given in this strike notice were ". . . the carrier's refusal to negotiate matters in dispute over change of operations and, failing to hold matters which are in dispute, status quo, pending mediation proceedings."

its submission of this matter to the Adjustment Board."

On March 13, 1958, which was the same day that appellant sent its telegram to the Adjustment Board, appellant instituted this action for injunctive relief. The suit was commenced in the District Court of the Second Judicial District of Montana, in and for the County of Silver Bow. A temporary restraining order was immediately issued by the state court enjoining the Brotherhoods from carrying out their strike threat. Upon being advised of this development, the mediator ceased his efforts at mediation. However, the files in the matter before the Mediation Board remained open.

The cause was thereafter removed to the United States District Court, District of Montana, Butte Division, because of the presence of a federal question. See 28 U.S.C.A., sec. 1331.

In dismissing the action the district court held in effect that (1) the dispute which led to the strike threat was a "major dispute" within the meaning of the Railway Labor Act and as such had been submitted to the National Mediation Board under section 6 of that act (45 U.S.C.A., sec. 156); (2) appellant could not legally have reduced the number of employees per switching crew from five to three while the section 6 procedure was pending, in view of the status quo

[1] In June 1958, following the commencement of this action, appellant submitted to the Adjustment Board certain time claims filed by the Brotherhoods, none of which brought into question the dispute which led to the strike threat.

provision of that section; (3) the status quo provision was circumvented and there was accomplished indirectly what could not be accomplished directly by the act of the parent corporation, Anaconda, in taking over the switching work and employing its own employees on a three-man-crew basis; and (4) a court of equity "will not lend its weight to such purpose by making permanent the temporary restraining order heretofore issued."[7]

Appellant contends that although a section 6 "major dispute" had been in existence it came to an end when the Brotherhoods rejected appellant's proposal, the latter withdrew its section 6 notices, and Anaconda took over the switching operation. Thereafter, appellant argues, any controversy that remained was either a so-called "minor dispute" concerning which a strike is unlawful, or was no labor dispute at all, thus escaping the sanctions of the Norris-

[7]The judgment of the district court here under review dissolved the temporary restraining order and, as before noted, dismissed the action. This court initially enjoined the strike pending disposition of the appeal, subject to certain conditions. The conditions were not fulfilled and on March 31, 1959, the injunction was dissolved, effective April 6, 1959. No injunction has been in effect since the latter date. We are advised that no strike has been called since dissolution of the injunction. This may be due to the pendency of an action in the District Court of the Second Judicial District of Montana in and for the County of Silver Bow. In the latter action, commenced on April 3, 1959, the International Union and one of its locals seek to enjoin Anaconda from returning the switching work at the new Berkeley Yard to railroad employees represented by the Brotherhoods. A temporary restraining order has been granted in that state action. Appellee Brotherhoods have applied to this court for a writ of prohibition to bring these state court proceedings to a halt pending disposition of this appeal. Brotherhood of Locomotive Firemen and Enginemen v. The Anaconda Company No. 16437.

LaGuardia Act.[8] In the latter event, or even if the controversy be regarded as a major dispute, appellant urges, injunctive relief should have been granted. The district court's view that such relief should be denied because appellant did not preserve the status quo is challenged. According to appellant, such a conclusion is possible only if the corporate identity of Anaconda is ignored, and this should not be done.

At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, the difference between these two kinds of dispute was explained as follows:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the

[8] 47 Stat. 70, as amended, 29 U.S.C.A., secs. 101-115

employment relation, or asserted one, independent of those covered by the collective agreement. . . ."

As to both kinds of dispute, the act requires that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help. Elgin, Joliet & Eastern Railway Co. v. Burley, supra, page 725. The Norris-LaGuardia Act prohibits the issuance of an injunction in a railway labor case involving a "major dispute." Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 42.

In the case of minor disputes, if negotiation fails either party may submit the matter to the appropriate division of the National Railroad Adjustment Board. The awards of the several divisions of the Adjustment Board are final and binding. Neither party is permitted to resort to self-help. A strike involving a so-called minor dispute is therefore to be enjoined. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra.

As before noted, appellant concedes that a section 6 major dispute was at one time in existence between these parties. Regardless of the concession, however, there could be no question as to this, since appellant itself gave the section 6 notices. The dispute, which

was later submitted to mediation, related to "working conditions," i.e., whether a road crew or a yard crew should do certain switching, and, if a yard crew, how many men would be in the crew. Appellant specifically requested a change in existing agreements concerning these matters. No question was involved as to the interpretation of existing agreements.

Appellant contends, however, that the major dispute involving these matters came to an end when the Brotherhoods rejected appellant's proposals, the latter withdrew its section 6 notices, and Anaconda took over the switching operations at the new Berkeley Yard.

The action of the Brotherhoods in rejecting appellant's proposals did not serve to terminate the mediation proceeding. Under section 5 of the act, 45 U.S.C.A., sec. 155, several other steps remained to be taken.[9] Likewise, the action of appellant in withdrawing its section 6 notices did not terminate the proceeding. The provisions of section 5 referred to in footnote 9 make it clear that the parties to a dispute under mediation may not unilaterally terminate the proceeding, but are required to follow each procedural step specified in the statute.

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[9]The next step was for the Mediation Board to endeavor to induce the parties to submit their controversy to arbitration. If either party had refused to arbitrate, the Board would then have been required to notify the parties in writing that its mediatory efforts had failed. After this had been done, no change could have been made in the rate of pay, rules, working conditions, or established practices for a period of thirty days unless in the intervening period the parties had agreed to arbitration, or an emergency board had been created under section 10, 45 U.S.C.A., sec. 160.

If the major dispute was terminated, therefore, it must have been for the reason that after the Brotherhoods rejected appellant's proposals Anaconda took over the switching operation at the new Berkeley Yard. Appellant asserts that when this occurred the subject matter of the dispute disappeared. Since employees represented by the Brotherhoods would not be doing the switching, the argument goes, any question of changing the Brotherhood agreements with regard to such switching operations was rendered moot.

It may be assumed, for present purposes, that where an independent shipper, not acting in concert with a carrier, determines to perform its own switching service on its own property, section 6 mediation proceedings involving a dispute relative to such service are necessarily terminated.

Here, however, the carrier is the wholly-owned subsidiary of the shipper—Anaconda. The two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these circumstances the act of Anaconda in taking over the switching service, to be performed by employees represented by another union, must be regarded as the act of the carrier. Otherwise, a carrier by interrelation with its shippers would always have it within its power to circumvent the mediation provision of the Railway Labor Act.

The circumstances of this case are particularly aggravated. With the necessary acquiescence, if not upon the direction, of its parent corporation, appellant gave the section 6 notices. The Brotherhoods and the Me-

diation Board were entitled to assume that this was a bona fide attempt to invoke the provisions of the act relating to major disputes. As events turned out, it was not, since appellant was not content or able to participate in the proceedings as an independent carrier. On the contrary, it always had it within its power, or so it thought, to terminate the proceeding through action by Anaconda.

We therefore conclude that the major dispute between appellant and the Brotherhoods concerning contract provisions applicable to switching at the new Berkeley Yard still exists. Likewise, the mediation proceedings instituted by appellant in an effort to resolve that dispute are still pending.

Appellant argues that even if this is so, the injunction should have been granted. This contention is based on the premise that the dispute is something different from what it started out to be. Appellant asserts that the dispute which now exists is whether the men represented by appellees are to be allowed to do the work at all.

But this view must necessarily be rejected in the light of what has already been said. The nature of the dispute has not been changed unless the action of Anaconda in taking over the switching operation can be regarded as that of an independent shipper not acting in concert with its carrier. It has been shown that this is not the case and that what Anaconda has done must be regarded as the act of the carrier. The dispute thus remains the same as when the section 6 notices were given.

On similar reasoning we agree with the conclusion of the district court that appellant has not maintained the status quo pending completion of the mediation proceedings, as required by section 6 of the act. This alone is enough to warrant dismissal of appellant's action for injunctive relief unless the decree sought to be entered would also require restoration of the status quo. Neither party has asked for the latter relief.

Injunctive relief may be utilized by either party to vindicate the processes of the Railway Labor Act. Virginia R. Co. v. System Federation No. 40, 300 U.S. 515. But here appellant does not seek an injunction to compel utilization of Railway Labor Act procedures. Rather it wants to enjoin employees from resorting to self-help after appellant itself (through Anaconda) abandoned those procedures. In addition to the reasons given by the district court for denying such relief, it was also necessarily denied for the reason that appellant had not exhausted its administrative remedies.[10]

Appellant also argues that the controversy is not a "labor dispute" within the meaning of the Norris-LaGuardia Act, and that the sanctions of that act are therefore inapplicable. Again, however, this contention is predicated upon the view that the initial

[10]Section 8 of the Norris-LaGuardia Act, footnote 8, supra, 29 U.S.C.A., sec. 108. It may be noted that if this had been found to be a minor dispute instead of a major dispute an injunction could not have been obtained, because the dispute was not submitted to the National Railroad Adjustment Board. See Manion v. Kansas City Terminal Railway Co., 353 U.S. 927.

dispute came to an end when Anaconda decided to take over the switching operation at the new Berkeley Yard. This, as we have decided, is not true.

There are certain decisions which a carrier may make which cannot give rise to "labor disputes" within the meaning of the Norris-LaGuardia Act.[11] But we have concluded that the controversy which resulted in the strike threat in the matter before us was a major dispute within the meaning of the Railway Labor Act. It was therefore a "labor dispute" within the meaning of the Norris-LaGuardia Act. In any event, the latter act stands in the way of granting injunctions under certain circumstances. It provides no basis for the granting of an injunction.

Affirmed.

(Endorsed:) Opinion. Filed May 18, 1959.

Paul P. O'Brien, Clerk.

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[11] See Brotherhood of Railroad Trainmen v. New York Central Railroad Co., 6 Cir., 246 F.2d 114; Chicago and North Western Railway Co. v. Order of Railroad Telegraphers, 7 Cir., ___ F.2d ___, decided March 13, 1959.

United States Court of Appeals
for the Ninth Circuit

No. 16,372

Butte, Anaconda & Pacific Railway Company, a corporation,
Appellant,
vs.
Brotherhood of Locomotive Firemen and Enginemen, etc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment
Filed and entered: May 18, 1959
Paul P. O'Brien, Clerk

Filed Nov. 4, 1958
Dean O. Wood, Clerk
By.....
Deputy Clerk

In the United States District Court
for the District of Montana
Butte Division

No. 633

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Defendants.

MEMORANDUM

Stripped of all the foliage, the issue presented by this case boil down to these:

1. Is the dispute between the plaintiff and the defendants a so-called "major dispute" to be processed under Section 6 of the Railway Labor Act (Section

156, Title 45, U.S.C.), or is it a "minor dispute" to be processed under Section 3 of the Railway Labor Act (Section 153, Title 45, U.S.C.)?

2. If, as the Court finds, such dispute is a major dispute, has the status quo provision of Section 6 of the Act been violated?

3. If the status quo provision of the Act has been violated, whether a Court of equity should grant an injunction in favor of a party to such violation?

The Railway Labor Act places the duty on carriers and their employees to exert every reasonable effort to settle all disputes between themselves and provides machinery and procedures for such settlement. Under the Act disputes are divided into two classes, so-called minor disputes and so-called major disputes. In both disputes, the parties are required to exert every effort to settle the dispute between themselves, but in the event the dispute remains unresolved after such efforts, in the case of a minor dispute it goes to the National Railroad Adjustment Board (Section 153, Title 45, U.S.C.), and after the procedures followed in the Act have been pursued, the National Adjustment Board will make an award which is binding on both parties. In the case of so-called major disputes remaining unresolved between the parties, either party may request the service of the Mediation Board (Section 156, Title 45, U.S.C.) and the dispute then goes through the procedures set up by the Act. In this case the difference between major and minor disputes is important for several reasons. In case of a minor dispute, under the jurisdiction of the Adjustment

Board, a strike can never be legal, the award of the Board being final and binding upon the parties, whereas in the case of a major dispute the Mediation Board makes no award and after the procedures set up in the Act have been followed, a strike may be legal. The plaintiff in this case started out following the procedures outlined for a major dispute, but then attempted to withdraw the Section 6 Notices which it had served and although the Mediation Board did not close the file on the dispute, the plaintiff then brought the case before the Adjustment Board.

The difference between the so-called major and minor disputes was pointed out by the Supreme Court in Elgin J. & E. R. Co. v. Burley, 325 U.S. 711. The Supreme Court, at page 723, said:

> "The first (major dispute) relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement *or where it is sought to change the terms of one*, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "The second class (minor dispute) however, contemplates the existence of a collective agreement already concluded or, *at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.*"

It seems clear from the record in this case that the dispute between the parties arose out of the attempt by the plaintiff to secure the amendment of the exist-

ing agreements with the defendant Brotherhoods to permit either the handling of loading operations by main line crews or to reduce the personnel of the yard crews from five persons to three persons. This dispute comes within the above quoted definition of a major dispute. Certainly there is no dispute over the terms or meanings of the existing agreements, but rather an attempt to amend the terms of the existing agreements.

Involving as it did an attempt to amend the existing agreements, the dispute between the plaintiff Railway Company and the defendant Brotherhoods was a major dispute to be handled in accordance with Section 6 of the Railway Labor Act (Section 156, Title 45, U.S.C.). That section, after providing that notice be given by either the carrier or representatives of the employees on intended change in an agreement affecting rates of pay, rules or working conditions and for the arranging of conferences between the parties, further provides:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The plaintiff Railway Company, as pointed out, initiated proceedings under this Section by serving so-called Section 6 notices, seeking to modify or amend the existing agreements to permit the loading of Berkeley Pit ore from the new Berkeley Yard either by main line crews or with a three man yard crew rather than a five man yard crew. When no agreement was reached in the conference between the Railway Company and the Brotherhoods, the latter invoked the services of the Mediation Board under the Act, and a mediator was assigned to the case. Thereafter, when no agreement was reached after conferences between the mediator and the parties, the Railway Company attempted to withdraw the Section 6 notices. However, the Brotherhoods protested the withdrawal of the Section 6 notices and the Mediation Board remained in the case and a mediator assigned to the case was present in Anaconda, Montana, when the work in the new Berkeley Yard was taken away from the Brotherhoods and given to another craft, the Brotherhoods served their strike notice, and the temporary restraining order enjoining such strike was issued. As soon as the temporary restraining order was issued, the mediator assigned to the case left the scene, but the file in the matter before the Mediation Board remained open at the time of the hearing in this court.

In view of the above quoted provision of Section 6 of the Railway Labor Act, it is clear that the plaintiff railway company could not on its own have made the change from a five man crew to a three man crew, as was done, without violating that provision of the

Act, because at the time the change was made the matter was still before the Mediation Board and a mediator was at the scene attempting to settle the dispute.

However, the Railway Company takes the position that the matter of making the change was out of its hands; that the new Berkeley Yard was an industrial yard of The Anaconda Company, and that the latter company had sole control over which craft would do the loading and switching work in the new yard and how many men would be employed in doing that work. That position might be perfectly valid in a case where the concern owning the industrial yard was unrelated to the carrier, but it has no validity in this case. Here the evidence discloses that to all intents and purposes and in every way except as to form, The Anaconda Company and the plaintiff Railway Company constituted but a single entity in their dealings with the defendant Brotherhoods concerning the loading of ore in the new Berkeley Pit. The Anaconda Company completely controls the Butte, Anaconda & Pacific Railway Company; the same person in one capacity or the other made all the decisions involved in this dispute and those decisions were made with the ultimate good of The Anaconda Company in view, and without regard to the obligations imposed on the carrier by its collective agreements and by the Railway Labor Act. It is crystal clear from the evidence that had the Brotherhoods acceded to the demands of the carrier for changes in the collective agreements members of the defendant Brotherhoods in the employ of

the plaintiff Butte, Anaconda & Pacific Railway Company would have been allowed to do the loading and switching work in the new Berkeley Yard.

13 Am. Jur., Sec. 7, page 16, has this to say concerning the disregarding of corporate entity:

> "The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. *The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts.* Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality."

Ballantine on Corporations, page 313-314, quoted in plaintiff's brief, has this to say concerning the subject:

> "*But after all it comes down to a question either of agency or of good faith, honesty and fairness in the use of the corporate privilege for legitimate ends.* If a corporation is controlled by another and is manipulated by the parent for its own purposes and in its own interests to the prejudice of innocent third parties, or the public welfare, it may be necessary to hold the controlling party responsible."

A statement that is particularly appropriate to this case and applicable to the third issue mentioned at the beginning of this memorandum is found in the

case of Home F. Ins. Co. v. Barber, 67 Neb. 644, 93 NW 1024, 60 LRA 927, 108 Am. St. Rep. 716 as quoted in 13 Am. Jur., page 161, as follows:

> "Where a corporation is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, and for their advantage, the corporation will not be permitted to recover."

By this memorandum the Court does not mean to infer that there is any fraudulent or illegal purpose in the ownership and control of the Butte, Anaconda & Pacific Railway Company by The Anaconda Company. On the contrary, it is a perfectly legitimate arrangement, which no doubt contributes generally to the welfare of both corporations and to the welfare of the community generally. All that is meant to be said is that such ownership and control of the Railway Company in this case was used to accomplish by indirection an end which the plaintiff Railway Company could not accomplish directly without violating the Railway Labor Act. Under such circumstances, this Court, sitting as a court of equity, will not lend its weight to such purpose by making permanent the temporary restraining order heretofore issued.

Dated this 4th day of November, 1958.

W. D. Murray
United States District Judge.

Filed Nov. 4, 1958
Dean O. Wood, Clerk
By.....
Deputy Clerk

In the United States District Court
for the District of Montana
Butte Division

No. 633

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard on the 16th and 17th days of July, 1958, plaintiff appearing by and through its attorneys of record, P. L. MacDonald and R. Lewis Brown, Jr., and defendants ap-

pearing by and through their attorneys of record David L. Holland and Harold C. Heiss.

Evidence, both oral and documentary, was submitted and received, and the Court now being fully advised in the premises from the legal evidence introduced, the stipulations of the parties, the admissions in the pleadings, and the legal arguments, makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That plaintiff is a railroad corporation duly organized and existing under the laws of the State of Montana, and as such operates a railroad in said State, hauling freight as a common carrier for hire and engaging in interstate commerce; that the Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association of persons acting as a collective bargaining agent and the duly authorized representative of plaintiff's employees engaged in serving the plaintiff as engineers, helpers, firemen, motormen, hostlers and hostler helpers; that the defendant Frank W. Glass is an officer of said association, to-wit: an Alternate Vice President; that the defendant J. H. McCarvel is a local officer of said association, to-wit: its General Chairman on the plaintiff railway; that the defendant Brotherhood of Railroad Trainmen is an unincorporated association of persons acting as collective bargaining agent and the duly authorized representative of plaintiff's employees engaged in

serving the plaintiff as conductors and brakemen; that the defendant H. E. Nevala is an officer of said association, to-wit: its Deputy President; that the defendant R. R. McLean is a local officer of said association, to-wit: its General Chairman on the plaintiff railway; that this is an action arising under the laws of the United States regulating commerce between the States; that the amount in controversy exceeds the sum of Three Thousand and no/100 Dollars ($3,000.00), exclusive of costs and interests.

II.

That plaintiff Butte, Anaconda & Pacific Railway Company is a wholly owned subsidiary of The Anaconda Company, both corporations are managed by the same staff of officers from the President down to and including the Secretary-Treasurer. All major policy decisions for the plaintiff, including those involving labor relations are made for it by its officers, who are also officers of The Anaconda Company, and in making such decisions the controlling consideration is the ultimate effect which the decisions will have on the profits earned by The Anaconda Company.

III.

That The Anaconda Company has owned and operated an open pit copper mine at Butte, Montana, known as the Berkeley Pit since sometime in 1956; that prior to March 14, 1958, the ores mined at said Berkeley Pit were loaded in plaintiff's ore cars at a loading yard near the said Berkeley Pit known as the

old Berkeley Yard; that the work of loading and switching the ore cars in the old Berkeley Yard and between said Berkeley Yard and the West Butte Yard of the plaintiff was, prior to said March 14, 1958, performed by yard crews of the plaintiff, who were members of the defendant Brotherhoods, under the agreements hereinafter referred to; that the said ore cars, when loaded and assembled in the West Butte Yard by the yard crews of the plaintiff as aforesaid, were picked up at the West Butte Yard and moved to The Anaconda Company's smelter at Anaconda, Montana, by the main line crews of the plaintiff, who were also members of the defendant Brotherhoods.

IV.

That at all times material to this action there were collective agreements entered into by and between the plaintiff and the defendants, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen, which agreements established the rates of pay, rules and working conditions for plaintiff's employees engaged in engine and train service and switching service; that under said agreements loading and switching of cars within a yard was to be performed by yard crews, as distinguished from main line crews which handled trains outside of yards and on the main line of the plaintiff; that under said agreements said yard crews consisted of five men, to-wit: an engineer, fireman, conductor, and two brakemen, and such was the make-up of the yard crews which prior to March 14, 1958, had been engaged in the work of loading and switching the cars in the

old Berkeley Yard and moving the same to the West Butte Yard of the plaintiff.

V.

That prior to March 14, 1958, a new loading and switching yard commonly referred to as the new Berkeley Yard and located approximately 3,000 feet from the old Berkeley Yard was constructed by the plaintiff for The Anaconda Company, the cost thereof being borne by The Anaconda Company, and said yard was completed and ready for operation on March 14, 1958. That said new Berkeley Yard does not connect with either the West Butte Yard of the plaintiff or directly with the main line tracks of plaintiff, but trains of ore cars from the new Berkeley Yard are moved over 14 miles of Northern Pacific tracks to Durant, Montana, and thence on to and over the main line of the plaintiff to the smelter at Anaconda, Montana.

VI.

That on or about September 27, 1957, in contemplation of the completion and putting in operation of the new Berkeley Yard, the plaintiff served upon the defendant Brotherhoods a Section 6 notice under the Railway Labor Act, as amended, proposing an amendment of the aforesaid collective agreements to permit the loading of ore in the new Berkeley Yard with main line crews of the plaintiff rather than yard crews; that thereafter when the said Brotherhoods rejected said proposed amendment, the plaintiff served a second Section 6 notice under the Railway Labor

Act, in which it was proposed that the existing agreements be amended to provide that the yard crews in the new Berkeley Yard consist of three men rather than five men, as provided in the existing agreements; that plaintiff offered to the defendant Brotherhoods and their members the work of loading ores in the new Berkeley Yard if the Brotherhoods would consent to the amendment of the existing agreements in either of the aspects proposed by the said Section 6 notices, but the Brotherhoods declined to agree to the amendment of the existing agreements in either respect.

VII.

That after the plaintiff and the defendant Brotherhoods failed to agree on the changes in the agreements proposed by the aforesaid two Section 6 notices, and on or about October 25, 1957, the defendant Brotherhoods invoked the mediation services of the National Mediation Board and the dispute between the Brotherhoods and the plaintiff, arising under the two Section 6 notices, was docketed by the Board as Mediation Case No. A-5623; a mediator was assigned to the case by the Board and a conference of the parties under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods continued to be unwilling to agree to the use of main line crews for switching operations or to the use of three-man switching crews. That then plaintiff informed the Brotherhoods that when the work of loading and switching the ore cars was transferred to the new Berkeley Yard, the work would be taken from

the plaintiff's employees and would be performed by employees of The Anaconda Company.

VIII.

By letter dated January 17, 1958, the plaintiff notified the mediator and the defendant Brotherhoods that it was withdrawing the Section 6 notices that led to the dispute docketed as Mediation Case No. A-5623, with the understanding that this withdrawal would terminate the mediation proceedings. The Brotherhoods nevertheless maintained to the Mediation Board that a dispute necessitating mediation continued because of the plaintiff's announcement on January 15 that its employees would cease performing the loading and switching of Anaconda ore cars on the day that the new Berkeley Yard was ready for operation. The Board decided to resume active mediation of the dispute and accordingly advised the parties that conferences would begin on March 5th in Anaconda, Montana; the plaintiff challenged the Board's authority to resume mediation, refused to participate in conferences with the Brotherhoods, and disregarded the Board's request that it withhold making effective the proposed change in the manner of handling, by plaintiff's yard crews, the loading and switching of the ore cars so as to not provoke a strike by plaintiff's employees.

IX.

By letter dated March 7, 1958, plaintiff advised the Brotherhoods that the loading of ore cars in the new

Berkeley Yard would commence shortly; that plaintiff's main line crews would move the trains of ore cars from the new Berkeley Yard over Northern Pacific tracks to Durant and on to Anaconda, and that the plaintiff did not consider the "status quo provisions" of the Railway Labor Act applicable to the contemplated change in the manner of loading and switching Anaconda ore cars. The plaintiff's employees held 15 regular switch-crew jobs and three loading jobs known as a "car dropper", when the loading of Anaconda ore cars in the old Berkeley Yard ceased on March 13, 1958.

X.

The Brotherhoods representing plaintiff's employees announced on March 11, 1958, that the employees would strike on March 14 because of the plaintiff's refusal to hold matters in dispute in status quo while the mediation proceedings were pending, as required by Section 6 of the Act (Section 156, Title 45, U. S. C.). On March 13, 1958, plaintiff obtained a temporary restraining order from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, enjoining plaintiff's employees from carrying out their threat to strike, and said cause was removed to this court and a hearing was had on whether the temporary restraining order should be made permanent. The mediator ceased his efforts at mediation when advised on March 13, 1958, that the employees were enjoined from striking.

XI.

That the work of loading and switching in the new Berkeley Yard is not materially different from the work in the old Berkeley Yard; that the decision as to what employees were to be given the work in the new Berkeley Yard was one to be made by C. H. Steele, who was and is the officer in charge of operations of the Butte, Anaconda & Pacific Railway and also in charge of the Western operations of The Anaconda Company; that if the defendant Brotherhoods had yielded to the request of plaintiff that the collective agreements be modified to provide for a three-man crew in the new Berkeley Yard rather than a five man crew, the work in the new Berkeley Yard would have been given to the Brotherhoods.

XII.

That, in dealing with the Brotherhoods in this instance, The Anaconda Company and Butte, Anaconda & Pacific Railway Company were to all intents and purposes, one employer and the separate corporate entities of the two corporations were used to evade the status quo provisions of the Railway Labor Act.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction of the parties and the subject matter of this action.

II.

That the plaintiff is a common carrier engaged in interstate commerce and operates subject to the Federal Railway Labor Act.

III.

That the dispute which led to the instant suit is primarily concerned with the amendment of the existing agreements between the plaintiff and the defendant Brotherhoods in the manner proposed by the two Section 6 notices above referred to, and as such is a "major dispute" subject to the mediatory jurisdiction of the National Mediation Board and mediation of the dispute was necessarily suspended by the Board pending the disposition of this action.

IV.

That under the terms of Section 6 of the Railway Labor Act (Section 156, Title 45, U. S. C.) the plaintiff in this case could not legally have reduced the number of employees in a yard crew from five to three while the Section 6 notice requesting such change was before the Mediation Board; that by virtue of the complete control by The Anaconda Company of the plaintiff Butte, Anaconda & Pacific Railway Company, said companies have accomplished indirectly what the plaintiff company could not have done directly without violating the status quo provision of Section 6 of the Railway Labor Act; that under these circumstances the plaintiff is not entitled to invoke the aid of a court of equity.

V.

That the temporary restraining order heretofore issued in this cause by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, on the 13th day of March, 1958, be dissolved.

Let counsel for defendants submit a draft of judgment in accordance with Rule 11(b) of the Rules of the District Court.

Done and dated this 4th day of November, 1958.

W. D. Murray,
United States District Judge.

In the United States District Court
for the District of Montana
Butte Division

No. 633

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Defendants.

JUDGMENT

This cause having come on regularly for hearing before the above-entitled Court, sitting without a jury, and on the 16th and 17th days of July, 1958, evidence, both oral and documentary being submitted and received and upon briefs having been furnished, the same was by the Court taken under advisement and thereafter the Court duly made and entered herein its Findings of Fact and Conclusions of Law favorable to the Defendants and, now, by virtue of the Law and by reason of the premises aforesaid,

It is Ordered, Adjudged and Decreed, that the temporary restraining order heretofore issued in this cause by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, on the 13th day of March, 1958, be dissolved.

It Is Further Ordered, Adjudged and Decreed that the permanent injunction prayed for be denied, and the case is hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the Defendants are hereby awarded their costs herein incurred taxed in the sum of ..... Dollars.

Done and dated this 12th day of November, 1958.

W. D. Murray
Judge of the Above Entitled Court

Service of the above Judgment acknowledged and copy thereof received this 12th day of November, 1958.

W. M. Kirkpatrick
P. L. MacDonald
R. Lewis Brown, Jr.
Joseph B. Woodlief
By: R. Lewis Brown, Jr.
Attorneys for Plaintiff
616 Hennessy Building
Butte, Montana